

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. J-07/08-321
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families (DCF) substantiating a report that the petitioner, a Roman Catholic priest, sexually abused a teenaged girl. The issue is whether the Department's decision is supported by a preponderance of the evidence. The following findings of fact are based on the testimony and other evidence admitted at the hearing in this matter held on October 27 and 28, 2009.

FINDINGS OF FACT

1. In April 2007 the Department received a report that that a then-sixteen-year-old girl had made statements to adult friends of her family accusing the petitioner of four specific incidents of inappropriate touching.

2. An initial investigation was conducted by a detective with the Lamoille County Sheriff's Department. On April 30, 2007 the detective interviewed the alleged victim under oath in the presence of an investigator from

DCF. The interview was tape recorded. Subsequent to that interview the detective obtained statements from several of the adults to whom the alleged victim had reported the incidents.

3. The matter was also investigated by the criminal division of the Vermont Attorney General's Office. An investigator with that division interviewed the alleged victim on June 14, 2007 and on September 18, 2007. The DCF investigator was present at the first of these interviews. At least one assistant attorney general with that office's criminal division was present during both interviews.

4. Sometime after these interviews the Department (DCF) substantiated the petitioner for sexual abuse of the alleged victim. In a review decision dated June 26, 2008 the Department upheld the substantiation.

5. The petitioner filed an appeal with the Human Services Board on July 15, 2008. The matter was continued for over a year primarily because of difficulty the petitioner's attorney had in obtaining records and access to witnesses relating to the criminal investigation in the matter. DCF's position in this appeal, despite the facts that it is also represented by the Attorney General's Office, and that its own investigator participated in the AG's

criminal investigation interviews, is that its own investigators, administrators, and attorneys cannot gain access to the records of a simultaneous criminal investigation. (See *infra*.)

6. The petitioner's attorney eventually gained copies of the criminal investigation interviews through a subpoena. To date, no criminal charges have been filed against the petitioner.

7. At the hearing in the matter the Department's case consisted mainly of the testimony of the alleged victim, who is now eighteen. The witness was nervous, but generally responsive and did not appear to have any mental deficits. On direct examination she gave a rote and cursory description of four alleged incidents (discussed in further detail below) involving the petitioner. In a probing, but certainly not hectoring, cross examination the witness became vague, evasive, contradictory, and highly selective in her recollection of the events in question.

8. The Department's case also included the brief testimony of the alleged victim's parents. Both gave testimony that substantially contradicted the alleged victim in several details (see *infra*).

9. After the Department rested its case the petitioner moved for a "directed verdict". The hearing officer advised the parties that on the basis of the evidence the Department had presented he would find that the Department had not made a credible *prima facie* showing that three of the incidents had occurred. The hearing then proceeded with the petitioner's defense regarding the fourth incident.

10. The petitioner's first two witnesses were the sheriff's detective and the AG's criminal unit investigator, both of whom testified under subpoena. They gave testimony and authenticated documents detailing several and substantial contradictions in the alleged victim's statements regarding all of the alleged incidents in question. In "chambers" following this testimony, the Department represented that its investigator (who had been present during two of the three "criminal" interviews with the alleged victim (see *supra*), may not have made the Department aware of the victim's conflicting and contradictory statements prior to the petitioner's appeal. The hearing was recessed, and Department subsequently informed the petitioner and the hearing officer that it would "drop" its substantiation regarding the fourth incident.

11. The Department advised, however, that it would nonetheless contest the hearing officer's ruling regarding the credibility of the alleged victim and her parents as it related to the other three alleged incidents.¹ Those incidents are discussed below.

12. The most serious allegation the alleged victim has made in this matter was that the petitioner sexually molested her in her bedroom in November 2005. There does not appear to be any dispute of the circumstances that led up to this reported incident. The petitioner was a friend and spiritual advisor who had known the family for several years. On the evening in question the alleged victim's parents had called him to their house because their daughter, then fourteen, was crying in her room after a confrontation with her parents regarding an incident that she had been involved in with some other young persons on Halloween night. The testimony and exhibits of several witnesses establish that the "Halloween incident" involved drugs, a sexual encounter, and a threat of violence, and that the alleged victim was extremely upset that her parents and others had learned of it.

¹Although it appears the DCF investigator may have neglected to provide or may have withheld similar information from the Department regarding these three incidents as well.

13. Depending on the time and audience, the alleged victim has reported that the petitioner entered her bedroom that night and sexually molested her in various ways. On direct examination at the hearing she reported that the petitioner put his head on her chest and "rubbed" her "chest" and "crotch" with his hand. She stated that the touching stopped when "someone" knocked on her door and the petitioner left her room. She stated that she remained in her room the rest of the night.

14. On cross examination the alleged victim added, apparently for the first time, that the petitioner had "grabbed her throat" that night and threatened her. She also stated that she "couldn't remember" the Halloween incident or why the petitioner may have been visiting her home that night. She specifically "couldn't remember" if she was upset over her perception that the petitioner was "taking the side" of another youth involved in the incident on Halloween.

15. In her interviews with the sheriff's detective and the AG's criminal division the alleged victim had stated that the petitioner had rubbed her breasts that night but specifically stated that he had *not* touched her crotch. There is no indication that she had ever previously alleged

that the petitioner grabbed her throat or verbally threatened her that night.

16. Of note is the fact that the alleged victim's memory of the details of the night in question during cross examination "improved" markedly after the lunch break, and contradicted several parts of the testimony she had given in the morning. She did not deny that she and her parents had hired an attorney to pursue a civil claim against the petitioner and/or the church.²

17. The alleged victim's mother gave conflicting testimony about whether her daughter had come downstairs with the petitioner after he had gone up to her room.³ The alleged victim's father testified, incredibly, that he did not remember having had any "argument" with his daughter that night.

18. As noted above, the alleged victim did not report this incident until a year and a half later. After the incident, the alleged victim and her family saw the petitioner on several occasions. The alleged victim's parents testified that their daughter was anxious to go on

²That attorney was present at the hearing the entire morning of the alleged victim's testimony.

³She was also evasive when asked about a civil lawsuit against the petitioner.

the Habitat for Humanity trip with the petitioner even though she did not know most of the other children who were going. There is also undisputed evidence that the allegations of abuse were first made during that trip immediately after the alleged victim had become upset with the petitioner over an incident in which she felt she had been unfairly reprimanded for violating safety protocols on the job site.

19. As noted above, the alleged victim is now eighteen, and her overall testimony and demeanor at the hearing was simply not credible. Her descriptions of the incident have been conflicting, inconsistent, and implausible. There is also a substantial indication that this and other allegations "mushroomed", possibly prodded by the attention she received from other adults after her other initial allegation, and the possibility that these allegations were related to the lingering resentments and anxiety toward the petitioner regarding his knowledge of the "Halloween incident". Her persistence, if not her consistency, in continuing to make these allegations may well also be influenced by the perceived financial gain a civil action against the petitioner might produce.

20. The other allegations against the petitioner concern two separate occasions during the winter of 2005-2006

when the petitioner gave the alleged victim rides on a snowmobile during group gatherings. The alleged victim states that during both of those rides the petitioner tried to push her arms down toward his crotch with his "elbows" while the alleged victim was riding behind him. She denied, however, that she touched his penis. In previous statements regarding these incidents the alleged victim gave conflicting testimony regarding "threats" the petitioner allegedly made at the time. At the hearing, her description and demonstration of the petitioner's actions, as well as the circumstances surrounding them, appeared highly implausible. Her allegations also beg the question of why she would get on a snowmobile with the petitioner just a few weeks after he had allegedly molested her in her bedroom, and a *second time* a few weeks later after he had *again* allegedly molested her the previous time she had gone riding with him, and *then* ask to go on a trip to West Virginia with him a year later.

21. As noted above, the Department has now "dropped" its substantiation of a fourth incident (which occurred more than a year after all the others, but which was actually the first one reported by the alleged victim). Nonetheless, the alleged victim's *marked* inconsistencies describing this incident (which, in the hearing officer's view, bordered on

preposterousness) further undermine her credibility as it relates to the other incidents she has alleged.

ORDER

The Department's decision substantiating the report of sexual abuse is reversed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, the petitioner does not question that the alleged acts, *if they occurred*, would be considered sexual abuse under the above statute. However, in a *de novo* hearing it is the Department's burden of proof to establish the facts of the allegations by a preponderance of evidence.

The Board can never take lightly the discrediting of allegations of child sexual abuse by an alleged victim. As noted above, however, the alleged victim in this case was indeed deemed not to be credible. Given her age and the seriousness of the allegations, she has been remarkably and inexplicably contradictory and inconsistent, and there is credible evidence calling into question the timing and motives behind her accusations and her family's persistence in prosecuting the matter.

Therefore, the Department's decision substantiating the report in question as one of sexual abuse must be reversed.⁴

3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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⁴ The Board need not reach the troubling statutory and due process questions raised by the DCF investigator's apparent failure to provide the Department with "pertinent" information regarding the alleged victim's conflicting and contradictory statements during the criminal investigation in this matter, and by the Department's resulting failure to timely make this information known and available to the petitioner in his appeal. See 33 V.S.A. §§ 4912(16) & 4915b(a)(8), and Fair Hearing Rule No. 1000.3H.